No. 86-704

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S APPENDIX, PART II

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STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR REHEARING AND APPENDIX

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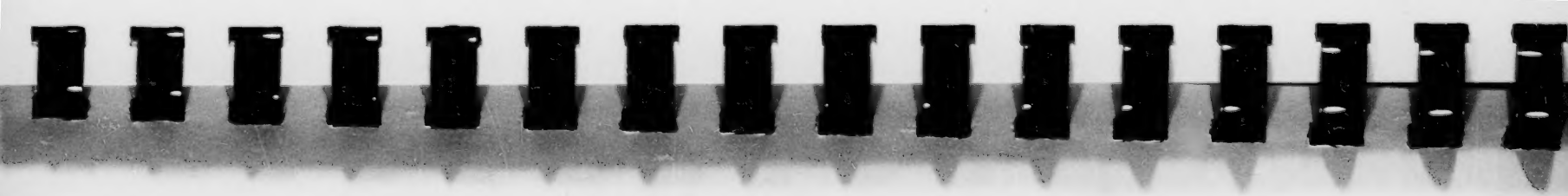

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UNITED STATES SUPREME COURT DECISIONS:

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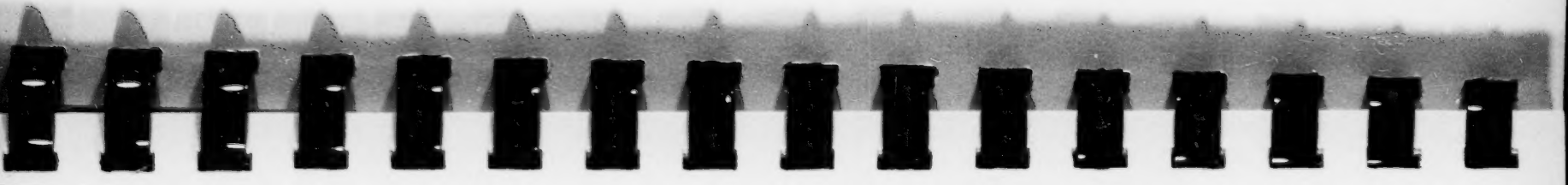


INTRODUCTION

Skip Berndt is innocent; the County Attorney is not. The State is unhappy with this Court's decision. The State alleges that this Court was wrong when it reversed the convictions because they were based on insufficient evidence. The County Attorney should be ashamed of the position taken in this proceeding. The State has sought to destroy this Court's impartiality and integrity by retrying the case to the press. The State has deluged this Court with material outside the record for no good reason. The State has advanced a most spurious argument that because it filed a petition for rehearing, Skip Berndt should be re-incarcerated. The State alleges that this Court did not mean what it said or understand and appreciate the gravity of its decision. Such arrogance can only

occur through the unbridled use of power. A response without anger is nearly impossible; no response is unthinkable and unforgivable. The allegations of the State will be dealt with as follows:

First, a reversal of a conviction for insufficient evidence, like a finding of not guilty, is not reviewable. Double jeopardy attaches upon the Court's pronouncement of reversal and not on the filing of the judgment. Consequently, a petition for rehearing does not affect the force of that decision. The case cited by the State reversed a conviction for reasons other than sufficiency and is therefore inapplicable.

Second, this Court was correct in reversing the convictions. The evidence was insufficient. Skip Berndt has maintained his innocence from the day of the fire. He will maintain his innocence until he dies. Any "errors" in the

Court's recitation of the facts in its decision are minor and unimportant. The State is simply "nitpicking" this Court's decision. "Errors" can be found in anything which is subjected to microscopic examination.

Third, Skip Berndt has maintained his innocence from the day of the fire. He will maintain his innocence until he dies. The State has included material outside the record to convince the Court, the public, or both, of the opposite. The prison inmate is not worthy of belief. He has taken an alleged statement, ambiguous at best, and turned it in to a confession one year later. The statement the inmate gave in his affidavit and the one he said to the prison official are totally contradictory and show how the "confession" was fabricated. The State also included a libelous attack on Professor Shelby

Gallien, the man honored by the National Association of Fire Investigators as their 1985 Man of the Year for his life-long contributions to the field. Mr. Gallien is unable to defend himself because he has suffered a series of strokes which have left him blind, bedridden, and without mental faculties. The State also includes material from a case where this Court upheld an arson-murder conviction. That case has no relationship to this one. In that case, the defendant hated the decedent, had numerous physical fights with decedent's mother, was observed starting the fire and admitted such before, during, and after the fire. The County Attorney knows that all of this material was improperly placed before the Court.

Finally, the State wants relief because it believes some trial exhibits were not physically taken to the Supreme

Court. Counsel should have ensured delivery or included copies in its appendix. Counsel cannot cite its own failure to perform as a reason for a rehearing.

Accordingly, the Petition for Rehearing should be denied.

ARGUMENT

I.

THE PETITION FOR REHEARING SHOULD BE DENIED BASED ON MINNESOTA CASE LAW AND THE DOUBLE JEOPARDY CLAUSES OF THE MINNESOTA AND UNITED STATES CONSTITUTIONS.

A. The Protection Of The Double Jeopardy Clause Cannot Be Avoided By Staying The Filing Of A Judgment.

Skip Berndt's convictions were reversed by this Court on March 21, 1986. This Court reversed because the evidence was insufficient to sustain the convictions. The Court held in a unanimous en banc decision:

> On appeal, Berndt claims that the evidence was insufficient to sustain the convictions. We agree. Accordingly, we reverse.

The State's petition suggests that Tibbs v. Florida, 457 U.S. 31 (1982), holds that "an appellate court's finding of insufficiency is still subject to

further appellate review" (State's Petition). That statement is wrong and purposely misleading. Tibbs' conviction was not reversed for insufficient evidence. The United States Supreme Court wrote the following regarding the issue of reversal for insufficient evidence:

> . . . the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect . . . .

Tibbs v. Florida at 41.

The State contends that a petition for rehearing voids or negates this Court's decision. That is incorrect. The petition of the State confuses "effect of a judgment" with "filing of a judgment." This Court has never extended or withheld a constitutional protection

based upon the performance or nonperformance of a ministerial act such as the filing of a judgment. To do so would exalt form over substance. However, that is precisely what the State urges this Court to do.

The Illinois Appellate Court considered a similar issue when a criminal defendant moved the court for a directed verdict. After arguments, the court directed a not guilty verdict on one count. The prosecution moved the court to reconsider and the court withdrew the directed verdict. The appeals court held that double jeopardy prohibits the judge from withdrawing his verdict once it is announced.

> "[W]e conclude that the validity of a court's pronouncement of a directed verdict does not depend upon whether judgment of acquittal is entered. We conclude that the announcement that the verdict is directed for defendant is sufficient to bar

> further prosecution . . . . The rendition of judgment is a judicial act, 'while the entry of judgment by the clerk is a ministerial act'. (citations omitted)."

People v. Stout, 438 N.E.2d 952, 955 (Ill. App. 1982).

Similarly, the court in a Maryland bench trial made a finding of guilty on one charge and not guilty on another. The prosecutor immediately argued that the not guilty decision was incorrect and convinced the court to change the decision and make a finding of guilty. The Maryland Court of Appeals reversed.

> It is therefore settled that once the trier of fact in a criminal case, whether it be the jury or the judge, intentionally renders a verdict of 'not guilty,' the verdict is final and the defendant cannot later be retried on or found guilty of the same charge. And, contrary to one of the arguments advanced by the State in the present case, it is not necessary that final judgment be entered on the docket.

> . . . The trial judge's initial statement of 'not guilty' . . . was not inadvertent or a slip of the tongue . . . .
>
> Once a trial judge intentionally renders a verdict of 'not guilty' on a criminal charge, the prohibition against double jeopardy does not permit him to change his mind.

Pugh v. State, 319 A.2d 542, 545 (Md. 1974). Therefore, the State cannot avoid the legal consequence of this Court's decision by the mere filing of a petition for rehearing.

A reversal based on insufficient evidence is a finding of not guilty and puts an end to the case. The United States Supreme Court grants absolute finality to reversal of a conviction for insufficient evidence. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978). Burks moved the trial court for a judgment of acquittal before submission to the jury. After he was convicted, he moved the trial court for a new trial on

the ground of insufficient evidence. The trial court denied the motion as 'utterly without merit.' Burks, at 2143. Burks appealed and the Court of Appeals agreed with Burks that the evidence was insufficient and reversed. The Court of Appeals remanded to the trial court to determine if an acquittal should be entered or a new trial ordered. The Supreme Court of the United States held that remand was inappropriate:

> Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty . . . . The purpose of the clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'

Burks, at 2150.

It is clear that this Court reversed

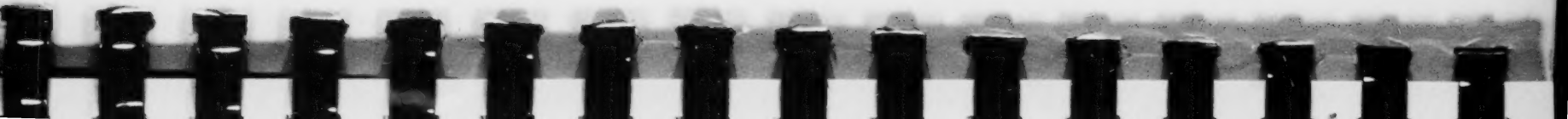
Skip Berndt's convictions on the grounds of insufficient evidence. First, the Court stated so. Second, the Court in footnote 1 of the opinion stated that, "In addition to raising the insufficiency of the evidence issue, appellant has alleged violation of discovery rules, an unconstitutional search, and deprivation of a fair trial. Our disposition makes it unnecessary to address those issues." And thirdly, the court did not remand for a new trial as it would have if it had based its decision on trial errors. Consequently, pursuant to Rule 28.02, subd. 12, Minn. R. Crim. Proc., and Minn. Stat. §632.06, Skip Berndt was absolutely discharged as a result of this Court's decision.

The position of the State is that this Court erred in the decision. The State is wrong factually because this Court was correct: the evidence was

insufficient and the convictions were based on mere speculation (See II, infra). The State is wrong legally because their argument is irrelevant. Reversals for insufficient evidence and not guilty findings are simply not reviewable.

In State v. Abraham, 335 N.W.2d 745 (Minn. 1983), defendants were charged with selling intoxicating beverages to minors. The defendants waived a jury and alleged the defense of entrapment. The trial court held that the State failed to prove predisposition of the defendants to commit the crimes. The State sought a pre-trial appeal on grounds of erroneous factual findings and application of the law. This Court dismissed the appeal as barred by the double jeopardy clause, stating:

> It is strongly argued that the trial court erred in determining that the defendants



> were entrapped. However, we do not decide this issue because of our holding that the double jeopardy clause bars the state's appeal.
>
> We base our holding that the state's appeal is barred on the decision of the United States Supreme Court in United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). The general rule applied in Scott is that 'a judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution . . . .'

It is the decision of the Court which reverses the convictions because they were based on insufficient evidence that controls and therefore terminates the proceeding. The formal filing of the judgment is irrelevant. In State v. Abraham, the State advanced a similar argument to the one presented here. This Court answered with the following passage from United States v. Scott:

> The fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination, but it does not alter its essential character.

Abraham at 748. Consequently, under Abraham, Burks and Scott, a reversal based on insufficient evidence terminates the prosecution. The fact that the State believes the decision wrong is immaterial.

In Tibbs v. Florida, relied on by the State, Tibbs was convicted and appealed to the Florida Supreme Court. The Court reversed the conviction. The plurality opinion of that Court "concluded that the 'interests of justice' required a new trial." Tibbs v. Florida, at 36.

The United States Supreme Court affirmed and held that a reversal and remand in that case were permissible.

But more importantly, the Court reiterated, contrary to the State's position, that:

> " . . . the Double Jeopardy Clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support conviction.

Tibbs v. Florida, 457 U.S. at 40.

Regardless of whether an acquittal has been filed, the State cannot appeal from an acquittal.

> Where the court, before the jury returns a verdict, enters a judgment of acquittal . . . appeal will be barred only when 'it is plain that the district court . . . evaluated the Government's evidence, and determined that it was legally insufficient to sustain a conviction'" (citation omitted).

United States v. Scott, 437 U.S. 82, 97 (1978).

In sum, this case has been in the post-trial and appellate proceedings for almost 2-1/2 years. This Court was

generously liberal in giving counsel for both sides extra time within which to prepare the appellate briefs. The Court received the briefs and set oral argument approximately four months later. Counsel for both sides were given ample opportunity to present their views at the oral argument. This Court then deliberated four months before announcing its decision. To suggest that this Court didn't appreciate the gravity of its decision or didn't consider testimony of record is insulting. The State has no right to a rehearing. A rehearing should be denied because this Court's decision was correct. The State simply wants a "second bite at the apple."

B. A Petition For Rehearing Should Be Denied When The Issues Raised In The Petition Were Discussed By Petitioner In Its Appellate Brief And Oral Argument.

Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure provides for

rehearings. That rule had its genesis over one hundred years ago in Derby v. Gallup, 5 Minn. 119 (Gilfillan 85, 1860). In that case, appellant did not prevail on appeal and petitioned for rehearing. The reasoning of the court is instructive and relevant to this proceeding. The reason requesting a rehearing was stated as follows:

> The application is based upon an affidavit of the counsel for the appellants, setting forth, in substance, that upon the argument of the cause . . . owing to an intimation of a member of the court, the counsel did not argue an important point in the case . . . That, in the decision of the case, the court held against the view entertained by the counsel, and, as he believed, the decision on that point (as well as others) was erroneous.

Derby v. Gallup at 104. The Court held that what is argued and the manner in which it is argued is the responsibility of counsel. The Court observed: " . . . counsel must argue their causes as fully

as they may be advised is necessary."

Derby v. Gallup at 105.

In denying the motion for rehearing, the Court held:

> But where a question of law has once been fully discussed on the argument, and considered by the court, we cannot admit that a party is entitled to a reargument, on the ground that there is a manifest error in the decision. We are not aware that any court has sanctioned such a practice, and it would be attendant with inconveniences and evils far overbalancing the advantage accruing in the particular instance.

Derby v. Gallup at 105 (emphasis added).

More recently, the following sentiment has been written concerning a rehearing:

> Minnesota Rule of Civil Appellate Procedure 140 is not intended to provide a party with one last chance to present arguments already rejected by the Court. The proper use of a petition for rehearing was described in Derby v. Gallup .
> . . .

3 Minn. Pract. App. Rules Annot., 2d Ed. 486.

The State's position simply is that it disagrees with this Court's decision. That does not justify a rehearing. All of the reasons advanced in the petition were raised by the parties in the briefs and many were specifically inquired into at the oral argument. The State's petition should be denied.

II.

THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THE DECISION IS CORRECT AND THE STATE IS MERELY REPETITIOUSLY REARGUING ITS CASE.

The Court reversed for insufficient evidence. The State failed to prove Skip Berndt guilty beyond a reasonable doubt. The State's petition is no more than a nitpicking rebuttal to the Court's decision and a reargument of issues previously rejected. The following are some of the "errors" alleged by the State. The petition discusses at great length the Court's finding that the State's chemist concluded that an accelerant was most probably gasoline when he testified it was gasoline. Or the fact that a neighbor and Skip Berndt came out of their respective homes at the same time even though the neighbor did testify that he concluded that they came

out of their homes at the same time (T.255). Or that Officer Adams didn't see the second floor on fire when he arrived when, in reality, Officer Christman testified that she didn't see the second floor on fire until after she arrived (T.82). Or that Berndt yelled for the fire department when he ran out his house when he actually yelled for the fire department and that his wife and kids were inside after he was outside (T.186). Or that the court found that Adams and Berndt searched for a ladder when actually Adams looked for a ladder and Berndt previously asked a neighbor to get a ladder and was told there was no ladder available (T.276). One of the neighbors said either Berndt or a neighbor asked for a ladder (T.184). The "errors" cited by the State are pedantic and inconsequential. To show the lack of proof, the Court wrote that even assuming

gasoline was present in the five chromatographically positive areas, the State did not meet its burden. The State is wrong in assuming that the Court accepted the hypothesis that the areas of suspicion contained gasoline. The Court only wrote that to show that there was no connection between Skip Berndt and gasoline. Accordingly, the entire argument of the State regarding the gasoline is misplaced and misleading.

As further support for its petition, the State engages in the same speculation that the Court rejected in the opinion. First, the Court rejected the "motives" of financial gain and womanizing as unproven and purely speculative. The State says the Court was in error when it wrote that Berndt was unaware of his wife's life insurance through work. The State directs the Court to the transcript of the omnibus hearing as rebuttal.

However, that testimony was not before the jury and the testimony was that Skip Berndt didn't know about any insurance (T.118), but suggested that there may be some at work. It is fair to conclude he didn't know because he said so, he was not a named beneficiary (T.706), the policy had been in effect since 1978 and no increase in coverage was ever requested (T.707,709). The policy was no more than a burial policy. The Court correctly concluded that Berndt was unaware of the credit life insurance covering the purchase of a used car (T.1244,1254). The State advanced the motive of financial gain, the State had to prove it with competent evidence. The State failed.

Even if one accepts a financial motive for murder, that motive cannot be extended to the boys. The State suggests

in the petition that Skip "may have concluded that if the boys also perished," Brenda's death would look more natural. This is the same type of speculation the State asked the jury to engage in. It is undisputed that Skip loved all three boys. The youngest insisted on sitting on Skip's lap for dinner when the extended family gathered at holidays. He coached the older boys in little league and had just bought them new bicycles for their birthdays (T.1206). There was no motive to kill the boys. But such a motive was integral to the State's theory.

The State also speculates that the Berndt family's financial condition points to murder. The State is wrong and the argument is a slap in the face of all wage-earning Americans. Skip Berndt had just received a promotion with more pay (T.1116). His wife was employed

(T.1116). His financial affairs were good enough to get a loan to pay for his used car. He had had five different loans with the same company in the five years preceding the fire, all with the same credit life insurance (T.695-697). Community Credit believed Skip Berndt was financially stable. There was no evidence the "bill collector" was hounding him. If economics is an issue, one would keep an income producing partner. If getting out of a marriage is an issue, Mr. & Mrs. Berndt would divorce each other, a process they both had used previously. Indeed, there was no motive proven but mere invitation to speculate.

That speculation is especially apparent when the State deals with the infidelity issues. The Court correctly found that those problems, if they were even serious to begin with, were resolved. The State says that the

evening of the fire, Skip took someone for a ride in his new used car and was alone with her. What sort of speculation does the State wish this Court to engage in? The State says a person with whom Brenda previously had an affair was drinking with the Berndts on the night of the fire. Even though they all testified everyone was having a good time and Skip didn't know of the affair until trial, what kind of speculation is the State suggesting? The State proved nothing but only attacked Mr. Berndt's character. The Court correctly rejected that line of reasoning.

Second, no one, including trained police officers, smelled any gasoline on Skip Berndt or his clothing (T.123,162,163,251,267,775). His clothing was not confiscated (T.347). Petitioner states that all of the fire experts testified that it is common not

to smell gasoline at the scene of the fire or on a person or a person's clothing. That is not the evidence. Although many experts testified that it is not uncommon not to smell the gas used to start a fire, they did not testify that if a person spilled some in spreading the gasoline, that it would not be smelled. Indeed, Mr. Davis' and Mr. Gallien's uncontradicted testimony was that gasoline vapors would be attracted to the groin and armpit areas of someone spreading five gallons. If the State's experts are correct, the gasoline vapors would instantaneously ignite throughout the house accounting for no smell. However, Skip Berndt would have also ignited had he set the fire because he would have been covered by vapors. The only individual who came close to testifying as the State suggests said he didn't smell gasoline after starting some

practice fires. However, we don't know how much he used; we don't know if anyone hugged him immediately afterward and therefore if that person smelled the gasoline; we don't know if he rode in a closed car with a police officer for over 20 minutes; we don't know if he went to a hospital a few hours later; and we don't know if he spread the gasoline while intoxicated after having been awake for nearly twenty-four hours. More importantly, however, the gasoline used in the practice fires was an oil-gasoline mixture -- decreasing the odor and explosiveness of the gasoline (T.164). What is true is that the firemen testified that they were taught to scream gasoline if they ever smelled any while fighting the fire (T.162). Indeed, the defense conducted an experiment on a piece of flooring tile similar to, but not taken from, Skip's home. Experiments

were run on Exhibit M, including the burning of gasoline on it. At trial, an investigator and former Minneapolis police officer, testified he could still smell gasoline on the exhibit (T.1287).

The State failed to prove that Skip got any gasoline anywhere. No siphoning equipment or container was found. Skip Berndt's car was searched. The police found nothing in it from an arson standpoint (T.973). The State suggests that 5 gallons of gasoline is a small quantity. The State is wrong. Was the five gallons carried in small containers of one gallon? If so, the process of spreading the gasoline would take an incredible amount of time. First, one gallon would have to be siphoned; then transported to the house; then spread throughout the house. That process would need to be repeated five times with only two results. One, the chances of any of

the occupants smelling the gasoline and leaving is greatly enhanced. Two, the gasoline would vaporize a long period of time and blow up the townhouse complex. The State criticizes this Court's statement that the caretaker was not missing any gasoline. The Court's conclusion was correct. The caretaker said the help used the gasoline (which was a gasoline-oil mixture) and the cans did not appear to be tampered with (T.917-919), and they were where they belonged (T.917-919).

The State says an explosion was heard by people one block away. However, the Sebraskis testified that it was like a firecracker on the Fourth of July. They also testified, they heard squealing tires after the pop (T.323). There was no evidence introduced that it was an explosion or that it came from Skip Berndt's home. The neighbors of Berndt

heard nothing. This includes Eddie Pickett, who said he was a light sleeper and heard Skip close his car door at a time consistent with Skip's arrival home from the night of socializing (1:00 a.m., T.204). He also testified Skip had nothing in his hands and had shoes on (T.205). The State's reference to State v. Daniels, a fire with mineral spirits and not gasoline, is totally irrelevant and the decision speaks for itself (See III, infra).

Third, the State says Skip could not have gotten out of the house. However, the State neglected the testimony of its own witness, Charlie Catron. Mr. Catron concluded that Skip and he came out of their homes at the same time (T.255). The State now tries to discredit this testimony. However, Charlie Catron did go back into Skip's home almost immediately (T. 257). He went over part

of the same area Skip said he went over, an area the State said contained gasoline (T.257-259), and therefore impossible to navigate. Mr. Catron did not experience severe injury (T.258). As a matter of fact, Mr. Catron got into the house as far as the metal strip separating the carpeted area from the linoleum area and to the feet of Brenda (T.258-259). If the State was correct, Charlie Catron could not have gotten into the house because he would first have had to go through burning gasoline vapors. As the experiments showed, linoleum tile burned with gasoline retains its high heat; Charlie Catron would not have been able to get in. If the State's theory was right, Charlie Catron would have perished in the fire or been severely disfigured. He wasn't. He experienced some singing (consistent with Skip's injuries) and only "burned" himself when he touched a

metal strip (T.260). Contrary to the State's theory, he saw no flames in the kitchen or entry as he went in (T.269-270). Clearly, the State was wrong. Even though Skip didn't prove he saw a doctor, he didn't need to. The State has this burden, not the defendant. In any event, Skip's mother, sister, and Skip testified to the condition and terrible pain of his feet (T.1144,1238,1253).

Fourth, the State alleges the Court erred in holding that the upstairs was not on fire when Officer Adams arrived. The State then contends that the issue of when the fire department arrived must be found in the State's favor, i.e. early arrival. However, the State is wrong. Officer Adams says he arrived at 2:48. He also kept calling the dispatcher to tell them it was a serioius fire (T.62). Officer Debra Christman, also a police officer of Brooklyn Center, said she

arrived at 2:55 (T.80). When she arrived, the fire department was not present, and only the lower level of the home was on fire. Within thirty seconds to one minute of her arrival, she said the second floor ignited (T.82). A neighbor, however, said Officer Christman was the first police officer to arrive (T.184). Also, a fireman present at the scene and fighting the fire said it had an average amount of smoke and did not have rapid acceleration (T.159-160). He also said that gas can be smelled at the scene (T.162). He also testified that the idea that gasoline had been used to set the fire never entered his mind even though he was a fireman for 16 years (T.163). A neighbor, who specifically disputed the arrival time of the fire department stated that the fire appeared controlled when it was fought with the pumper truck (T.229,231,283-284).

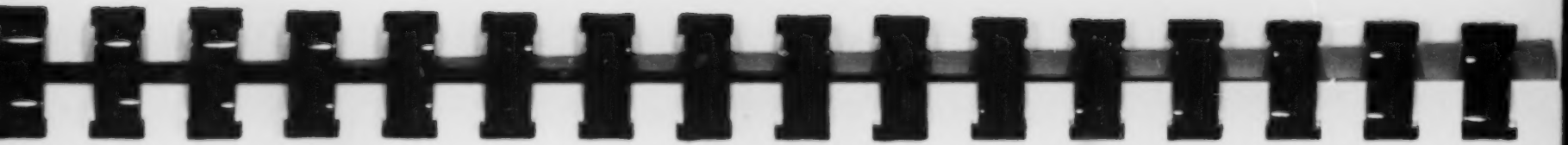
However, when that ran out of water and the hoses had to be connected to the hydrants, the house reignited and the fire was much worse (T.284).

Fifth, contrary to the State's theory and assertion in its petition, the carbon monoxide levels of Brenda and the boys are inconsistent with a gasoline fire. The State's theory was that five gallons of gasoline was spread throughout the home --either quickly and carelessly or slowly and carefully. All who testified agreed gasoline starts to vaporize immediately upon being spread. All also agreed that lighting the fire would instantaneously ignite or explode all of the vapors throughout the home, wherever the vapors were. The State theorized that gasoline and vapors were present in the boys' bedrooms. However, if that were the case, the vapors in the rooms would have immediately ignited.

The boys would have breathed super-heated air and died. They would not have had a lethel level (more than 40%) of carbon monoxide in their systems (T.882). Rick's level of carbon monoxide was 75%, Corey's was 72%, and Mike's was 90% (T.882). Consequently, gasoline vapors could not have been present. Brenda's death was also inconsistent with the State's speculative theory of knocking her out, pouring gas on her and lighting the fire. Had that happened, she would have virtually no carbon monoxide because the gasoline vapors would have ignited, she would have breathed and seared her lungs with no absorption of carbon monoxide. However, Brenda had 25% carbon monoxide; close to a fatal amount and indicative of breathing smoke.

The State's case was grounded on speculation and character assassination. The Court correctly rejected it. The

State invites this Court to engage in further speculation. That invitation should be rejected.



III.

THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE SKIP BERNDT IS INNOCENT AND THE PETITION INCLUDES MATERIAL BEYOND THE RECORD ON APPEAL.

Approximately 40% of the material presented by the State in support of its Petition for Rehearing, exclusive of photocopied cases, is information outside the trial record. One can only assume that this was done in an attempt to bring improper influence and pressure on this Court to agree with the State. These tactics should not be tolerated. (Note: the Mr. Knutson contained in the improperly appended transcript is not the Mr. Knutson who represents Skip Berndt.)

The only proper information before an appellate court is matters admitted in the trial court. This Court has so ruled:

> It is elementary that the supreme court is vested only with appellate jurisdiction . . . . Appeals, therefore, must be decided solely upon the evidence actually presented to the trial court and shown by the record on appeal . . . . Affidavits, filed or obtained after the trial obviously could not have been presented to the trial court and are entitled to no place in the appellate record and briefs. Clearly, they may not be considered as part of the evidence by a court of review.

Holtberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586 (1952). Because the improper material is so intricately interwined with the petition as a whole, counsel requests the entire petition be denied as the only effective method of excision.

However, the State did file material outside the appellate record. Counsel could disregard the material and thereby give it greater credibility. Or counsel could respond and be accused of "protesting too much." Recognizing the

inherent evils in such a decision, counsel for Skip Berndt will respond to the improper allegations.

Skip Berndt is innocent and the State did not prove he wasn't. This Court was correct in that assessment. The State has now included a series of affidavits which are false in their implications. The State has alleged that Skip Berndt has confessed to the crimes. That is not true (See Appendix 1-3). But because the State has taken this case out of the courtroom and into the media, counsel for Skip Berndt cannot idly sit back and fail to respond.

What would the State do if Malveaux testified for a criminal defendant? The State would point out to the jury that he has been convicted of aggravated robbery with a gun on January 12, 1977, theft and attempted escape on February 29, 1980, escape on November 14, 1980, theft from

person on January 12, 1983, two counts of robbery on March 18, 1983, and the crime of escape on April 3, 1986. All of these are felonies (See Appendix 4-9).

If Malveaux testified for a criminal defendant and he and the defense attorney said no promises were made for the testimony, the State would then show that Malveaux was promised a transfer to Lino Lakes (a minimum security institution) from Stillwater (a maximum security institution) in exchange for the testimony. The State would then show that Malveaux escaped from Lino Lakes in 1985. The following is the MCIU CASE COVER SHEET regarding that incident:

> The defendant was in lawful custody of the Minnesota Department of Corrections at the correctional facility at Lino Lakes. At 7:45 p.m. September 21, 1985, the defendant had a visitor and as the visitor was leaving, he asked to take a laundry basket

> out to the visitor's car. The defendant then left the institution grounds and did not return . . . he was located in Texas and returned to the State of Minnesota . . . .

How would the State treat Malveaux if he testified for a criminal defendant and used those statements to implicate a third party? The State would point out that the statement was never a "confession" and that the words were ambiguous because Malveaux told the police, "And what I got from what he said, that he set the fire himself." The State would then point out to the jury that Malveaux never reported this "conversation" to anyone at the time it was made and came forward only when he was in a position to get something. The State would then put Malveaux's affidavit next to the Parks' affidavit and show how the ambiguous statement grew and changed into something entirely different as

payment time neared for the services rendered. The State would also call Mr. Frank Benjamin. Mr. Benjamin would testify that Malveaux offered to lie for Benjamin in court to get Benjamin out of a potential criminal charge. (See Appendix 21). In its final impeachment of Malveaux, the State would quote the following from the January, 1983, nonconfidential portion of his presentence investigation:

> He stated he gets into trouble when he has nothing to do but also stated he likes the excitement of crime and said there is a certain thrill in getting away with something and talking about it to others. (See Appendix 10-12).

Skip Berndt has steadfastly denied committing a crime. There is no evidence to the contrary. The State waited one year to charge him in an attempt to get such evidence. Now an individual who has much to gain tells a story of something

that he says happened more than one year ago. The State wouldn't believe him if he testified for a defendant or if his evidence was the basis for a new trial by a defendant. There is no reason to accord him more dignity just because the State is in a position to purchase his story. Purchased testimony is like purchased love: you get what the seller thinks you want (See Appendix 13,14).

The State has included a complaint by the Roseville Fire Marshall against Professor Shelby Gallien. The State's immaterial and irrelevant documents seek to show that Professor Gallien is a fake and a charlatan. Also, the State seeks to show, by a letter from Massachusetts dated two days before it was printed, bound, and filed with this Court, that Professor Gallien has avoided a response on the complaint. The complainant was retained by the State to assist in

preparation of its case and sat next to the prosecutor throughout the entire trial.

The attached affidavit shows that these allegations are false (See Appendix 15,16). The President of the National Association of Fire Investigators received a letter from the fire marshall castigating the National Association of Fire Investigators for honoring Professor Shelby Gallien as their Man of the Year in August, 1985. The President said the complaint was without merit and was dismissed. The President also concluded that the fire marshall lacked even an elementary understanding of the field of fire and arson investigation. The President suggested that if the fire marshall wished to pursue the matter, he should contact the International Association of Fire Investigators (See Appendix 17-20). The President then

stated Professor Gallien has suffered a series of debilitating strokes which have left him bedridden, blind, and without mental faculties. He lives in a nursing home in his hometown.

The State has included transcripts and the opinion from State v. Daniels, 380 N.W.2d 777 (Minn. 1986). Because these materials were not presented to the trial court and are not part of the record, they are improperly before this Court. However, as the Daniels' decision points out, there is no relevance to Skip Berndt's case. First, witnesses virtually saw Daniels ignite the apartment. Second, Daniels didn't dispute any of the expert testimony. Third, Daniels virtually confessed before, during, and after the fire. Fourth, the witnesses testified to fights between Daniels and the mother of the decedent three days before the fire and

the day of the fire. Fifth, the State proved Daniels hated the decedent. Finally, the fire was not started with gasoline. Obviously, the two cases are unrelated. Each rose and fell on the state of its own record.

IV.

THE PETITION FOR REHEARING AND MOTION FOR ORDER DELIVERING EXHIBITS SHOULD BE DENIED BECAUSE THE RESPONSIBILITY FOR ENSURING DELIVERY OF THE TRIAL RECORD IS WITH COUNSEL.

The State alleges that a portion of the trial court exhibits was not forwarded to the Surpeme Court. Assuming arguendo that this occurred and also assuming that the Court did not refer to the exhibits, it is clear the Court did not need to view the exhibits because the testimony was clear. The two exhibits the State contends were most important -- those showing the floor plan of the ground floor and second floor of the townhouse -- were included in the Appendix to Appellant's Brief. Although those diagrams did not include the red lines or body positions, they did include the five areas of the alleged

chromatographically shown gasoline. Consequently, no prejudice was suffered by the State. These issues were extensively briefed and argued by counsel. Counsel could have included copies in its appendix if counsel felt the exhibits significant to the argument.

The responsibility of ensuring delivery of the record is on the party wishing to rely on it. This Court has held that the litigant who wishes to utilize the record " . . . bears the burden of taking the necessary steps to have the clerk of the trial court forward the original file to the Supeme Court." Holtberg v. Bommersbach, 235 Minn. 553 (1952). Counsel referred to the testimony explaining the exhibits, fully briefed, and argued the issues. Because counsel did not take the necessary steps of ensuring delivery, counsel cannot

complain after the Court has rendered its decision.

CONCLUSION

In conclusion, the Petition for Rehearing should be denied. The double jeopardy protection attached on the rendering of this Court's decision. The mere filing of a document by the State, regardles of its title, cannot alter that fact. Because a reversal of a conviction for insufficient evidence has the same effect as an acquittal, appellate review is not proper. This Court's decision was correct from both a factual and a legal position. The State is merely restating arguments advanced in its appellate brief and at oral argument. The information outside the record which has been used by the State is false and purposely

misleading. The petition should be denied.

Respectfully submitted,

WILLIAM R. KENNEDY
Hennepin County Public Defender

By _____
DAVID KNUTSON
(Atty. Lic. No. 57058)
Assistant Public Defender
Attorney for Respondent
C-2300 Government Center
Minneapolis, MN 55487
(612) 348-7530

DATED: this 10th day of June, 1986.

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STATE OF MINNESOTA

SS: AFFIDAVIT

COUNTY OF WASHINGTON

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

I Robert D. Mitchell, being first duly sworn under oath, deposes and says:

I met SKIP BERNDT soon after he got out of R & O and came to work in OMR print shop here at Stillwater prison.

He was a self-starter and learned quickly so I made it a point to get to know him and teach him as much about printing as I was able. And in the process we got fairly close on and off the job. Also despite being a confirmed cynic and pessimist, I realized he did not belong in prison....I should know...I've spent more than thirty years in and out of federal and state prisons. For these reasons I also gave him advice on doing time. To choose his friends carefully, the type of people to avoid, not to just associate with anyone because they were friendly. He was a man out of place and knew it. Because of it, he hung mostly with guys from work for a long time.

During the time in question, (last April) he was very busy with his appeal and if I remember right calling and writing his attorney regularly. We had just moved back to B-east in March and he was borrowing my law books and case law constantly. I also read his transcripts and briefs and gave him advice on shepardizing etc. All during that period he wasn't to my knowledge sharing pot or confidences with strangers as the state claims in the newspapers.

In prison we are plagued by opportunists who when in trouble will take advantage of others due to jealousy or hopes that it will help them with the authorities. Jails do not teach a serious regard for the truth. Not when it is to avoid punishment upon ones self. The system takes advantage of this. And certain individuals play on it, in these places.

I still feel that Skip is innocent of the crime charged and that an investigation of the so called witness be made with an open mind.

Robert D. Mitchell

ROBERT D. MITCHELL #120312

SIGNED AND SWORN TO BEFORE ME

14th DAY OF April, 1986

Sandra L. Woulfe

Notary Public or other person authorized to administer oath.

SANDRA L. WOULFE
NOTARY PUBLIC — MINNESOTA
WASHINGTON COUNTY
My commission expires: Jan. 15, 1991

STATE OF MINNESOTA

SS: AFFIDAVIT

COUNTY OF WASHINGTON

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

I Dean Danielski, being first duly sworn under oath, deposes and says: I met SKIP BERNDT during early February 1985; at which time i began work at the OMR print shop here in Stillwater prison.

Skip seemed like a very caring and compassionate individual, and we soon became very good friends,sharing not only work but also personal problems and each others company as well. we also shared each others cases and it became evident that from all the evidence(or lack of) that we also believed in each others innocense. Skip always maintained that he was innocent and still found it very hard to deal with the loss of his family. Skip always had a picture of his family hanging on his cell wall, something that a guilty person would not do.

During the time in question, (April, 1985) Skip, Pat Patrick and myself spent alot of time together. We not only worked together but also shared each others problems and joys. Skip was not one to share confidences with strangers or smoke pot as has been claimed by the state in the newspapers.

I am proud to have Skip for a friend and firmly believe in his innocense and would strongly question the truthfullness and the motives of the so-called witness.

Dean A. Danielski

DEAN A. DANIELSKI

SIGNED AND SWORN BEFORE ME THIS

14th DAY OF April, 1986

Sandra L. Woulfe

Notary Public or other person authorized to administer oath.

SANDRA L. WOULFE
NOTARY PUBLIC — MINNESOTA
WASHINGTON COUNTY
My comm. expires Jan. 15, 1991

Page 3 of Appendix

DATE: April 16, 1986

TO: David Knutson

FRuM: Russ Krueger

SUBJECT: State versus Orville Berndt

On this date, I along with Robert Bickford of this office went to the Minnesota Corrections Facility in Stillwater, Minnesota. There talked to Gayle Rachey, DOB 3/14/50, who at the end of the month will be moving to Duluth at 519 North 22nd Avenue West, 55806, (218) 722-8151. He stated that he was a friend of Orville Berndt's and also of Frank Benjamin's.

He stated that Frank Benjamin had been up to Anoka County on an escape charge and was accompanied by Tony Melvow. He said there were two females also going to Anoka Jail, and while they were either walking to or in the elevator Frank Benjamin grabbed one of the female inmates by the posterior or as Gayle Rachey said, "he grabbed her by the ass." Frank Benjamin told Gayle Rachey that the girl complained to the Sherrif and that they were going to bring him up on charges on Criminal Sexual Conduct. When they were discussing it in the cell Tony Melvow told Frank Benjamin, he said, "I will lie for you in court, tell me what you want me to say; to hell with them broads I'll lie for you." He said he thought nothing of it, but when he came back the more he thought of it he thought it was kind of funny, but he was worried about being charged in Anoka County and told Gayle Rachey what had happened, and Rachey stated, "just make sure that he'll still be around to testify for you if he's needed.

Rachey stated that Melvow was on a highrisk back in 1980 because he did escape, then he had the two escapes from Lino Lakes. He said while he was in the same cell block area with him, just before he left for Lino Lakes about March 19th of this year, that Melvow got a letter from the State of Texas. It was in regards to him having a gun in possession when he was arrested for fleeing a police officer while he was on escape from Lino Lakes. Melvow wanted to know if Rachey could help him in case he needed to get some kind of quick advise so he wouldn't have to go back to Texas. Rachey said that Melvow never showed him the letter, but had told him on previous occasions what had happened in Texas, that they had a highspeed chase and when they arrested him he had a gun in possession, and they were going to charge him down in Texas with felon with a pistol and also with fleeing a police officer, felony fugative.

He stated that as long as he knew Skip Berndt in jail, Skip never used any drugs. He then told us to talk to Reed Doc Holiday, another inmate in the institution. Reed Holiday was brought in and he stated that he, himself, has smoked alot of marijuana but on several occasions asked Berndt if he wanted to use some, and Berndt kept on turning him down. Reed suggested that we talk to Floyd Patrick who was the best friend of Berndt's while he was in jail. He said that Melvow was known as a story teller, that he would match any story that anyone else had to say, and really doubted that Melvow got next to Berndt because Berndt wasn't that type, because to put it quite bluntly, he said, "Berndt did not like blacks." He said Melvow is black black.

and referred to Melvow on a couple of occasions that he didn't trust the "little nigger." Then Rachey and Holiday stated that nobody trusted him and nobody had nothing to do with him. He said he had very few friends and even the rest of the blacks in the cell block area had nothing to do with Melvow. He was known as a snitch for the screws and nobody went near him. We will attempt to talk to Floyd Patrick tomorrow and also we are going to get transcripts from the court sentencing in Anoka by Judge Phylis Jones. This date, Robert Bickford went to that area to contact the Judge's court reporter and the clerk of court.

/s/Mr. Russell Krueger
Investigator

AFFIDAVIT

State of Minnesota)
) ss.
County of Hennepin)

CRAIG CASCARANO, being first duly sworn and deposed, says that:

1) He is the attorney who represented Orville Berndt, Jr. at trial;

2) On April 12, 1986, Affiant spoke to John Kennedy, President of the National Association of Fire Investigators;

3) Mr. Kennedy told Affiant that in August, 1985, the National Association of Fire Investigators were honoring Mr. Shelby Gallien as Man of the Year;

4) The honor was based upon outstanding achievements and contributions to the field of arson and fire investigation;

5) Just prior to the national convention, as president of the National Association, Mr. Kennedy received a letter from Mr. Bruce Ryden, Fire Marshal of Roseville, Minnesota, complaining that Mr. Gallien was not worthy of the honor about to be bestowed upon him by the National Association;

6) Mr. Kennedy told Affiant that upon reading Mr. Ryden's letter, it became apparent that Mr. Ryden lacked even an elementary understanding of the field of fire and arson investigation, as well as the sciences of physics and chemistry that are an integral part of arson investigation;

7) Mr. Kennedy told Affiant that Mr. Ryden's complaint was totally without merit and was dismissed by the National Association as frivolous;

8) Mr. Kennedy sent Mr. Ryden a letter firmly rebuking him for an unwarranted and unfounded attack upon Mr. Gallien;

9) Mr. Kennedy further advised Mr. Ryden that if he wished to pursue his complaint, he should contact the International Association of Fire Investigators;

10) Mr. Kennedy has learned that Mr. Ryden contacted the International Association, but the complaint has not been investigated because they were not able to locate Mr. Gallien;

Craig Cascarano

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11) Affiant has learned that Mr. Gallien suffered a series of debilitating strokes, leaving him bedridden, unable to see, and virtually with no mental faculties;

12) Mr. Gallien is confined in a nursing home in his hometown.

FURTHER, AFFFIANT SAYETH NOT.

CRAIG CASCARANO

Subscribed and Sworn To this

17th day of April, 1986.

Notary Public

RUSSELL J. KRUEGER
NOTARY PUBLIC—MINNESOTA
HENNEPIN COUNTY
MY COMM EXPIRES APR 27, 1990

NATIONAL ASSOCIATION OF FIRE INVESTIGATORS

A Non Profit Association

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MICHAEL C. DAVIDSON
Fire Investigator
Wheatridge, Colorado
BOB DOYLE
Fire Investigator
Greencastle, Indiana
Captain GEORGE PACKISH
Falmouth, Mass. Fire Dept.

September 6, 1985

Mr. Bruce E. Ryden, Fire Marshal
Bureau of Fire Prevention & Investigation
Roseville Fire Department
2660 Civic Center Drive
Roseville, Minnesota 55113

Dear Mr. Ryden:

I thank you for your letter of August 29, 1985 regarding Professor Shelby Gallien.

I can see from the comprehensive and thorough nature of your letter that you have given this subject a great deal of thought.

I will attempt to answer your letter to the best of my ability. I hope you will accept this in the same kindly, friendly, and informative way in which it is intended.

In the last paragraph of your letter you state:

> "I would ask that you respond to this letter but realize that no response will probably ever be forthcoming as there can be little or no defense for the action of Mr. Gallien".

I do not know why you would believe that I would not respond to your letter. I answer all of my telephone calls and each piece of mail that is addressed to me.

I was surprised by your letter. I did not know that Mr. Gallien testified in that fire case you mentioned.

I have always thought of and respected Shelby Gallien as a teacher and professor who initiated much of the training that is now being done in the fire field.

Shelby Gallien is being honored as NAFI "Man of the Year" in 1985 for his efforts in establishing the original Purdue Arson Seminar in 1943 when he was a Professor at Purdue University and headed up the Public Safety Institute at that University.

From that first Seminar in 1943 where less than 20 persons attended, that annual event grew until it later attracted as many as 400 fire investigators from all over the world. The Purdue Arson Seminar was the first school to teach any type or kind of fire investigation. It has since been emulated by many schools, seminars, and training programs throughout the country.

It was at this Purdue Arson School that the International Association of Arson Investigators was planned, formulated, and given birth. Shelby Gallien was instrumental in the formation of that fine organization. If it were not for Shelby Gallien and some of the other pioneers in that field, that Association would not exist.

Shelby Gallien was honored by the IAAI on numerous occasions when they held their annual meetings at Purdue. I hope your opinion of Shelby Gallien based on his courtroom testimony does not also cause you to question the credibility of the International Association of Arson Investigators, or the reliability of the information being provided by them to inexperienced investigators.

I know of no Association such as IAAI or NAFI which would take responsibility for an individual member's opinion as expressed in courtroom testimony. In almost every fire case which is tried there are qualified and credible fire experts testifying on behalf of both the plaintiff and defendant in both civil and criminal cases. This certainly does not mean that the experts on one side would deride the opposing experts because they differ with their opinions.

I am extremely sorry that in the first paragraph of your letter you state that you cannot attend our 23rd Seminar to be held the week of September 18, 19, and 20, 1985 at the Bismarck Hotel in Chicago. I believe that free expression should be given to all persons who objectively consider facts such as you have listed in your letter. It would be my intention to give you some podium time to discuss the facts contained in your letter with those persons in attendance.

I think that differences of opinion should be expressed when they are honest, constructive, and meant for educational purposes.

At any rate Mr. Ryden, I want you to know that the National Association of Fire Investigators is honoring Shelby Gallien for his over 50 years in the fire field. They are honoring him for his being a pioneer in setting up fire schools and seminars as well as for his assistance in formulating and helping with the creation and continuation of both the International Association of Arson Investigators as well as the National Association of Fire Investigators.

In paragraph two of your letter you state "Surely there must be some member of your Association who is more qualified to receive this award than Shelby Gallien". We know of no person in the entire Association of in any other fire Association that has done as much for the fire field as Shelby Gallien has done in initiating and perpetuating training programs that started with Purdue University and with Shelby Gallien. If you know of any other persons in the fire field who you would like to nominate, we would appreciate your input and would seriously consider it.

Incidentally, Mr. Gallien was the victim of a life threatening stroke about a year ago. He has been confined to a hospital for the last 6 months. We are hoping that his family will be able to have him present at the seminar to receive his award in person, and to hear from his many friends who wish to acknowledge his contribution to the fire field which covers almost 50 years.

Many of the present fire investigators were not even born when Shelby Gallien encouraged the university to initiate the first fire program ever established at any location anywhere.

At any rate, we at the National Association of Fire Investigators thank you for your letter. We acknowledge that each person is entitled to his own opinion, and as I said previously we encourage diversity of viewpoints when given and held honestly in an objective fashion.

We believe your comments were meant in that way, and we accept them as such.

We would like to hear from you further. Perhaps you can suggest a candiate for the 1986 award.

Sincerely,

THE NATIONAL ASSOCIATION
OF FIRE INVESTIGATORS

John Kennedy
President

JK/cs

DATE: April 30, 1986

TO: David Knutson

FROM: Russ Krueger

SUBJECT: Orville Berndt

On this date, I went to Hennepin County Jail to talk to Franklin Benjamin, who is held for Probable Cause Burglary. I talked to Franklin Benjamin about Antione Melvow. Franklin Benjamin stated that he knew Melvow real well; described him as a male whore that he knew in Stillwater. He said that he knew Bert alittle bit but not alot, but knew Melvow better. Franklin Benjamin stated that they were on their way up to Anoka County to face an escape charge, and that Melvow was also on his way there to face an escape charge. While they were in the elevator or small room, he can't remember which, he was in the back corner facing the door and there were two females ahead of him. He said Melvow was up near the front of the building facing the same direction he was, and was the first one out of the door. He stated while they were in the room the girls accused him, Franklin Benjamin, of grabbing them by the ass; he denied it. The jailors talked to Franklin Benjamin about it, and he denied, and Antione Melvow told Franklin Benjamin at that time, "don't worry about it, I'll lie for you when we get to court." Franklin Benjamin stated that Melvow had no way to see the incident, if it did happen he said, but he was compromising himself and told Benjamin that he would lie for him in court.

Franklin Benjamin stated that Melvow would do anything for favors; he used to trade his body for sexual favors so he could get dope, cigarettes, candy, etc. from the other prisoners. He said he is a lier and an exaggerator. He would so testify in the court of law.

No promises or threats were made to Franklin Benjamin, all he asked for was help on his case, to have somebody represent him, and if it's possible to help his tow friends that were with him that were picked up on a similiar charge. One being Robert Grayowl, and the other one Ambros Keybolt.

/s/Mr. Russell Krueger
Investigator